IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE

CRIMINAL APPEAL NO. 220 OF 1995

Suresh Mohaniraj Thakur
Residing at Indiranagar (Tekdi),
Vani, Taluka Dindori, Dist. Nasik. ..Appellant.
(Orig.accused)

V/s.

The State of Maharashtra ..Respondent.

Mr. S.V. Kotwal with Mr. P.N. Joshi for the Appellant.

Dr. F.R. Shaikh, A.P.P. for the Respondent/State.

CORAM : S.S. PARKAR, &
ANOOP V.MOHTA, JJ.

DATE : 9TH FEBRUARY, 2005.

ORAL JUDGMENT (PER ANOOP V. MOHTA, J.)

. The appellant was charged, tried and convicted of an offence punishable under Section 302, however, acquitted of an offence under Section 498A of Indian Penal Code (IPC). Therefore, this appeal against the order of conviction.

2. As per the prosecution on 11/11/1993, the appellant, during the quarrel with Changunabai (the deceased), poured kerosene on her from the stove and set fire. The burn injuries were 70%. The neighbours came

and extinguished the fire. The defence of the appellant was that, he was not present on the spot at the time of incident, and when he came, found that the deceased was burning. He tried to extinguish the fire, therefore, he suffered 5% burn injuries. The deceased was hospitalised. In the hospital a Special Judicial Magistrate (P.W.11) (Kisanlal Bora) (SEM) was summoned and a dying declaration (Exh.22) was recorded on 11/11/1993, which was scribed by one Shri S.B. Deshmukh, P.W. 8 and not by the SEM, as he forgot to bring his spectacle. In the said dying declaration it was stated by the deceased that the appellant after pouring kerosene, set her on fire. The said dying declaration was treated, as FIR and crime was registered accordingly. On 12th November, 1993, the appellant was arrested. The spot panchanama and inquest panchanama were recorded on the same day. On 12/11/1993, at 9.20 a.m., in the presence of Medical Officer, when the deceased was conscious, the Special Judicial Magistrate (SEM), P.W.10, Mr. Baviskar, recorded the second dying declaration (Exh. 30) at Nasik, wherein the deceased had stated that she was burnt as stove exploded. The statement made in the second dying declaration, no where

implicated and/or suggested the name of the appellant. The statement made therein was in contradiction to the first dying declaration. On 23rd November, 1993, the deceased succumbed to the burn injuries. The accused was also medically examined by P.W. 6, Jagdish Patil. After completion of the investigation the appellant was charge-sheeted. The charges were framed under section 498A r/w section 302 of IPC and same were denied by the appellant and pleaded not guilty. No evidence was led by the appellant in support of his defence. The prosecution has examined 13 witnesses. Most of them were declared hostile. The learned Judge, however, based on the first dying declaration Exh.22, dated 11/11/1993, found him guilty of the murder.

3. Heard learned Counsel Mr. S.V. Kotwal for the appellant and learned A.P.P., Dr. F.R. Shaikh for the State.

4. The order of conviction is based on the first dying declaration, dated 11/11/1993. The learned Judge over looked the second dying declaration Exh.30, dated 12/11/1993. The contents of the second dying

declaration are totally favouring the appellant. The Counsel appearing for the appellant relied on **(1993) 1 S.C.C. (Kamla V. State of Punjab)** and **(2004) 6 Supreme Court Cases 34 (State of A.P. V.Shaik Moin)** and contended that, in view of the Apex Court's decisions in regard to the effect of multiple dying declarations the conviction order based on the first dying declaration is not correct and also in view of the apparent material inconsistency between the two dying declarations in question. The second dying declaration was recorded by SEM after following the procedure, as contemplated under the law. The Second Dying declaration was supported and corroborated by the evidence. Whereas improperly recorded first dying declaration was unsupportive and un reliable. The relevant para (5) from Kamala (Supra), makes point more clear.

> "It is well settled that dying declaration can form the sole basis of conviction provided that it is free from infirmities and satisfies various tests (vide Khushal Rao V. State of Bombay). The ratio laid down in this case has been referred to in a number of subsequent cases with approval. It is also settled in all those cases that the statement should be consistent throughout if the deceased had several opportunities of making such dying declarations, that is to say, if there are more than one dying declaration they should be consistent. If a dying declaration is found to be voluntary,

> reliable and made in fit mental condition, it can be relied upon without even any corroboration. In a case where there are more than one dying declaration if some inconsistencies are noticed between one and the other, the Court has to examine the nature of the inconsistencies namely whether they are material or not. In scrutinising the contents of various dying declarations, in such a situation, the Court has to examine the same in the light of the various surrounding facts and circumstances."

5. In the present case, as noted, there is inconsistency in the dying declaration made by the deceased. P.W. 2, Kamal, a servant who saw the deceased with burn injuries also not supported the prosecution case. She made the reference of Shantabai and Venubai (P.W.4), who were present at the relevant time P.W. 3, Eknath Bhoye. the brother of the deceased also not supported the prosecution case, as only after information they reached to the Civil Hospital and saw badly injured sister i.e. the deceased. This witness was also declared hostile and in the cross-examination by the public prosecutor, this witness denied that the appellant had murdered his sister by setting her on fire.

6. P.W.4, Venubai, was also declared hostile. Her

presence was recorded by P.W. 2. She could not support the prosecution case. She has deposed that, she knew nothing about the matter. She has denied the earlier statement made before S.E.M. that the deceased had stated to her that she was set on fire by the appellant. P.W. 5, Pramod, a neighbourer, was also declared hostile, who refused to say anything about the incident.

7. P.W. 6, Dr. Jagdish Patil, Medical Officer, who attended the deceased when she was admitted in the hospital on 11/11/1993. This Medical Officer gave consciousness certificate of the deceased, and there after the first dying declaration was recorded by the S.E.M. This Doctor had examined the appellant/accused on 12/11/1993 and confirmed 5% burn injuries on his left hand.

8. P.W. 7, Jayshree Thakur, a key witness to the incident, a minor daughter of the deceased and the appellant, who was studying in III standard on the date of evidence, aged 8 years, also not supported the prosecution case. This witness has deposed that the incident happened at night, when her mother (the

deceased) was cooking the food, suddenly, the stove flared up and the deceased caught fire. The deceased was thereafter, taken to the hospital. In answer to the public prosecutor’s cross-examination, she denied that her father-appellant was present when her mother (deceased) got burn injuries. She further denied that the appellant took out kerosene from the stove, poured it on the deceased and ignited with the match stick.

9. P.W. 8, Head Constable, Suresh Deshmukh, who had scribed the first dying declaration of the deceased, as Mr. Kisanlal Bora (P.W.11) SEM, for want of spects and because of old age and week sight unable to write the said dying declaration. This witness has admitted that the said dying declaration was written as per the dictation by Mr. Bora. On the basis of which the FIR in question was registered. This witness has admitted that article "B" was not in questions and answers form.

10. P.W. 9, Dr.Govind Kulkarni, who was attached to the Civil Hospital, Nasik, as a Medical Officer, conducted the post-mortem of the dead body of the deceased and certified that the death of the deceased

was due to extensive burn injuries.

11. P.W. 10, Prabhakar Baviskar, second Special Judicial Magistrate, who also recorded the statement of P.Ws,3,4, and 9. This witness had recorded second dying declaration, dated 12/11/1993,Exh.30. This witness has supported the second dying declaration and the defence case, that the deceased got burn injuries, while cooking the food, on the stove and when she caught fire, her husband was not present at the relevant time.

12. P.W. 11, the Special Executive Magistrate, Kisanlal Bora, had recorded the first dying declaration Exh.22. There is a material on the record that the first dying declaration was not recorded by the SEM in his own hand writing, it was scribed by P.W. 8, Deshmukh. The dying declaration was also not recorded in question and answer form.

13. P.W. 12 Suresh Kulkarni was attached as a P.S.I.to the Dindori Police Station, supported the prosecution by proving the documents Exh.33 to 38.

14. P.W. 13, Kisan Gavali, was P.S.I. was attached to the Vani Police Station from 20th March, 1992 to 27th July, 1994, who submitted the altered charge-sheet and recorded the statements of P.W. 7 Jayshree.

15. All these witnesses according to us, have no where supported the prosecution case to corroborate basically the contents of first dying declaration Exh.22, based upon which the order of conviction was passed. We have noted that in the first dying declaration, the deceased had implicated the appellant by stating that her husband Suresh had poured kerosene and set her on fire and therefore, she got burn injuries. She had further stated that when her daughter shouted, the neighboures Pramod (P.W.5), Kamal (P.w.2), Shantabai, Venubai (P.W.4) rushed towards her and after extinguishing the fire took her to the hospital. We have already noted that P.W. 7, P.w 4, P.W. 3 no where supported even this statement of the deceased. P.W. 2, P.W. 5 and P.W. 7 were declared hostile. No other persons were examined, as named in the first dying declaration, Exh.22, by the deceased. This first dying declaration was not recorded by the SEM in his own hand

writing. The same was not recorded in question and answer form. This was recorded at Vani, on 11/11/1992. The deceased thereafter was shifted to Nasik, Civil Hospital. On 12/11/1992, as summoned by the police Station Sarkarwada, Nasik, the second dying declaration in question and answer form was recorded by the SJM, Bora, P.W. 11. The patient was conscious and was in a position to make statement. An endorsement to that effect was made by the medical officer P.W.9, Kulkarni, before whom the said statement was recorded. In the second dying declaration, we have noted that the deceased had categorically stated that at about 8.30 p.m., while she was cooking the food, the stove flared up and, therefore, she got burn injuries. She had also stated that her husband was not returned from the work at that time and her daughters were playing out side. When she shouted, neighbours came and extinguished the fire and later on taken her to the hospital. There is no implication or any role referred of the appellant. We have noted that this dying declaration was recorded after following the due procedure of law, including putting to the deceased the relevant question as required under the law. The SEM had recorded the

statement in his own hand writing, when the patient was conscious and was in a position to make the statement as per the certificate and endorsement of the Medical Officer.

16. The contents of the first dying declaration, as noted also not supported by any other witness, even the daughter of the deceased and the appellant. There is no other corroborative evidence to support the contents of first dying declaration, specially when the deceased had named persons with their specific respective roles, including the role of the appellant. However, as the prosecution witnesses have not supported the contents of the first dying declaration itself, we are of the view that the second dying declaration which was duly recorded and supported by the witnesses, including the minor daughter of the deceased, Special Executive Magistrate and the Medical Officer, is more reliable and need to be accepted.

17. After considering this and the various lacunas in the first dying declaration and specially for want of corroborative material to support the prosecution case,

we are of the view that the second dying declaration is more reliable and appears to be voluntary and was made in fit mental condition. There is material inconsistency between these two dying declarations. The material inconsistency in this matter changes the whole prosecution case, in so far, as allegations made against the appellant about his role in burning his own wife the deceased. It raises various doubts. After scrutinising the contents of these two dying declarations and in the facts and circumstances of the case, we are not in the agreement with the view taken by the learned Judge. It cannot be over looked that the appellant was acquitted for the offence under Section 498A of IPC. We are of the view, that the prosecution has failed to prove beyond reasonable doubt that the appellant and no one else has committed the crime in question.

19. For this reason the findings and reasoning given by the learned Judge is unacceptable. The appellant is not guilty. Therefore, the appeal is allowed. The Judgement and order dated 5th April, 1995 passed by the III Additional Sessions Judge, Nasik, in Sessions Case No. 152/1994, is hereby quashed and set aside. The

bail bond stands discharged.

[S.S. PARKAR, J.]

[ANOOP V. MOHTA, J.]